NO. 48209-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRANK WALLMULLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber Finlay, Judge

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred by failing to consider whether Wallmuller's obligation to pay legal financial obligations (LFOs) would impose a manifest hardship on him as RCW 10.01.160(4) requires.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. RCW 10.01.160(4) explicitly permits Wallmuller to move for remission of LFOs at any time for manifest hardship. After a fact-finding hearing, does the trial court's failure to respond to Wallmuller's RCW 10.01.160(4) request render RCW 10.01.160(4)'s remissions process a nullity and violate due process?

2. Should Wallmuller not substantially prevail on appeal, should he have to pay appellate costs if requested by the State?

STATEMENT OF THE CASE

Frank Wallmuller represented himself at trial but also had court-appointed standby counsel available to assist. RP[1] 23. The jury found Wallmuller guilty as charged of five counts of rape of a child in the first degree and four counts of sexual exploitation of a minor. CP 291.

Rape of a child in the first degree is a Class A felony with a maximum sentence of life in prison. RCW 9A.44.073; RCW 9A.20.021(1)(a). Because rape of a child in the first degree is subject to

[1] There is a single volume of verbatim report of proceedings for this appeal.

indeterminate review board sentencing, Wallmuller was sentenced to life in prison with only the possibility of release after serving 318 months. RCW 9.94A.507. CP 295; RP 27-29. Wallmuller, born in 1945, was 64 years old at sentencing. CP 291. He would be 90 years old when first eligible for release.

At sentencing, the State asked the court to impose a combination of discretionary and mandatory LFOs. RP 19. The trial court imposed the LFOs without making a determination of Wallmuller's present and future ability to pay them RP 31. Wallmuller did not object. RP 19-33.

The court took no action on the pre-checked boilerplate at Judgment and Sentence Section 2.5.

> 2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:
>
> [X] That the defendant has the ability or likely ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 294.

The court imposed these mandatory fees:

- $500 Victim assessment
- $200 criminal filing fee
- $100 DNA collection fee

The court imposed these discretionary fees:

- $250 Jury demand fee
- $1,227.50 Sheriff's service fees
- $418.28 Other (clothing - $31.28, Transcripts - $387.00)
- Court-appointed attorney fees $7,365.00

CP 296-97. This obligated Wallmuller to pay $10,061.68 in LFOs. CP 297. Wallmuller did not have to start making his $25 per month LFO payments until 60 days after his release. CP 297. Interest accrued on the judgment starting December 29, 2009, the date of his judgment and sentence. CP 297.

Wallmuller filed a direct appeal in which he challenged his convictions. *See State v. Wallmuller*, 164 Wn. App. 890, 895, 265 P.3d 940 (2011). This court affirmed the judgment and sentence and issued its mandate May 9, 2012.

In June 2015, Wallmuller filed a motion with the trial court asking that his legal financial obligations be terminated or modified. CP 297-290. He cited as authority both RCW 10.01.160(4) and RCW 10.01.160(3). CP 288. He filed a supporting affidavit arguing (1) the trial court failed to make the required determination that he had the present and future ability to pay LFOs, and (2) given his age, he would likely not live to see release. CP 285-86.

Pro se Wallmuller appeared telephonically at a hearing held on July 21, 2015. RP 37. The court acknowledged that at sentencing it gave no consideration to Wallmuller's financial situation including his ability to pay LFOs. RP 41-42. The court declined Wallmuller's invitation to apply *State v. Blazina*,[2] 182 Wn.2d 827, 344 P.3d 680 (2015) retroactively. The court took Wallmuller's other argument, the court's ability to use its discretion to remit any unpaid LFOs, under consideration. RP 42. On November 18, 2015, the court entered a written order declining to consider Wallmuller LFOs under *Blazina* and RCW 10.01.160(3). The order failed to address Wallmuller's RCW 10.01.160(4) remittance argument contrary to its promise to do so. CP 279-80. Wallmuller appeals the court's order. CP 278.

ARGUMENT

1. RCW 10.01.160(4) explicitly permits Wallmuller to move for remission of LFOs at any time for manifest hardship. The trial court's failure to consider whether Wallmuller suffered a manifest hardship renders RCW 10.01.160(4)'s remissions process a nullity and violates due process.

a. Wallmuller's request for remission of his LFOs fit squarely within the relief authorized by statute.

RCW 10.01.160(4) provides the LFO remission procedure.

[2] *Blazina* reiterated the requirement under RCW 10.01.160(3) that trial courts consider a defendant's present and future ability to pay discretionary LFOs prior to any imposition of the same.

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.[3]

This statute's meaning is clear: if LFOs are imposed on a defendant, the defendant "may at any time petition the sentencing court for remission." RCW 10.01.160(4); *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011) ("The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time*.") (alteration in original).

Because defendants may move for remission at any time, it follows that they must be given some process on the subject of remission when they so move. The second sentence of RCW 10.01.160(4) reads, "If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate

[3] RCW 10.01.170 allows the court to set a time period or specify installments for LFO payments.

family, the court may remit all or part of the amount due in costs…." Without some fact finding process, no court could satisfy itself that payment will or will not impose a manifest hardship. No manifest hardship determination can be made unless and until the moving party can present evidence and arguments to the trial court demonstrating why the LFOs cause manifest hardship. A commonsense reading of RCW 10.01.160(4) requires a hearing on manifest hardship.

Washington courts interpreting the remissions statute have recognized that the actual merits of a remission petition must be considered. In *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). Division One rejected the appealability of an order denying a RCW 10.01.160(4) remission motion because, in its view, orders denying remission are neither final judgments nor amendments to judgments under RAP 2.2(a)(1) or (9). This was so, according to the court, because the plain language of the statute makes the "amount imposed [in LFOs] . . . subject to modification." *Smits*, 152 Wn. App. at 524. The court explained,

> A decision to grant or deny a motion to remit LFOs is a determination of whether the defendant should be required to pay *based on the conditions as they exist when the request is made*. It does not alter or amend the judgment but rather changes the requirement of payment based on *a present showing* that payment would impose manifest hardship.

Id. (emphasis added). *Smits* supports the conclusion that trial courts must consider manifest hardship based on the defendant's present circumstances. That is precisely what the trial court did in *Smits*: "The court held a hearing and entered separate orders denying Wallmuller's Motion to Modify and/or Terminate Legal Financial Obligations." *Id.* at 518. Wallmuller, like *Smits*, needs a factual hearing on his motions to remit LFOs based on the consideration of his current circumstances.

The consideration of presently available facts is especially warranted in indigent cases. Division III of this court, in *State v. Crook*, 146 Wn. App. 24, 28, 189 P.3d 811 (2008), concluded the defendant failed to show the superior court "erred in denying his motion [to remit] without a facts hearing." This issue warrants additional review. Prior to *Crook*, Division Two noted that "additional fact finding from the bench is probably warranted in low income cases." *State v. Campbell*, 84 Wn. App. 596, 600, 929 P.2d 1175 (1997). The *Campbell* court, somewhat incredulous toward the trial court for determining Campbell could pay LFOs, stated, "Although it is difficult to comprehend how a person supporting himself and a child on $700 per month would have *any* disposable income, Campbell indicated that he did, so we uphold the trial court's finding." *Campbell*, 84 Wn. App. at 600. Therefore, "under these

facts, the trial court did not abuse its discretion by denying" Campbell's motion. *Id.* at 600-01. *Campbell*'s marked reservation in the context of low income cases, foreshadowed the need for enhanced judicial scrutiny of an indigent person's actual, present ability to pay LFOs when the indigent person moves for remission based on manifest hardship.

Although *Blazina*, 182 Wn.2d 827, concerned former RCW 10.01.160(3), the Court emphasized that a superior court, in assessing a defendant's ability to pay LFOs, must conduct an individualized inquiry and consider factors "such as incarceration and a defendant's other debts, including restitution." 182 Wn.2d at 838. Because of *Blazina*, this court should determine that a motion to remit requires a factual hearing.

An adequate remission process - one where a defendant's financial circumstances are actually considered - is necessary to the constitutionality of the LFO system as a whole. In *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L. Ed.2d 642 (1974), the United States Supreme Court rejected Fuller's equal protection challenge because Oregon's statute, like Washington's, provided a remissions process. "The convicted person from whom recoupment is sought thus retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs of his legal

defense will impose 'manifest hardship[.]'" *Id.* at 47. The Court concluded, "The legislation before us, therefore, is wholly free of the kind of discrimination that was held [previously] . . . to violate the Equal Protection Clause." *Id.* at 47-48.

Other federal courts have interpreted *Fuller* as requiring examination of a defendant's financial circumstances whenever the issue of hardship arises. *See Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (holding that, under *Fuller*, courts must give a defendant notice and opportunity to be heard on repayment of counsel fees and "the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required"); *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979) (construing *Fuller*'s constitutional requirements to mean that a person against whom LFOs were imposed "ought at any time to be able to petition the sentencing court for remission of the payment of costs or any unpaid portion thereof. The court should have the power to issue remittitur if payment will impose manifest hardship on the defendant or his immediate family").

Washington courts have also recognized that a robust remissions process is constitutionally required. This recognition began in *State v. Barklind*, 87 Wn.2d 814, 817, 577 P.2d 314 (1977), where the Washington Supreme Court recited what is constitutionally required under *Fuller*:

> [A] convicted person under obligation to repay may petition the court for remission of the payment of costs or of any unpaid portion thereof. The trial court order specifically allows the defendant to petition the court to adjust the amount of any installment or the total amount due to fit his changing financial situation.

Likewise, in *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992), the court listed one of the seven requirements that "must be met" for Washington's LFO scheme to be constitutional: "The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion." RCW 10.01.160 was constitutional, in part, because the "court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." *Curry*, 118 Wn.2d at 916.

In *State v. Blank*, 131 Wn.2d 230, 244, 930 P.2d 1213 (1997), the Washington Supreme Court upheld the constitutionality of the appellate

cost scheme under RCW 10.73.160, because it "allows for a defendant to petition for remission at any time." The court noted that an obligation to pay "without opportunity for a hearing in which the defendant may dispute the amount assessed or the ability to repay, and which lacks any procedure to request a court for remission of payment violates due process." *Blank*, 131 Wn.2d at 244. More recently, in *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 303-04, 165 P.3d 399 (2007), the court "delineated the salient features of a constitutionally permissible costs and fees structure" to require that the "convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion . . . ."

The constitutional lesson of all these cases and the plain language of RCW 10.01.160(4) is that defendants must be given a fair hearing of the subject of their LFO remission motions so trial courts can make a manifest hardship determination based on the facts. A statute allowing a party to move for a remission at any time based on manifest hardship, while disallowing that party to present evidence and arguments germane to the manifest hardship determination, makes no sense. Such a restricted reading renders RCW 10.01.160(4) meaningless and impermissibly undercuts the constitutionality of Washington's overall LFO scheme.

Here, when Wallmuller was sentenced in December 2009, the court found, via the boilerplate language of paragraph 2.5 in the judgment and sentence, that Wallmuller "has the ability or likely future ability to pay the legal financial obligations ordered herein." CP 294. However, the Court did not inquire into Wallmuller's financial resources or consider the burden payment of LFOs would impose on him. RP 19-32.

After Wallmuller filed his motion to modify or terminate his LFOs under RCW 10.01.160(4), the trial court made no inquiry and only promised to consider his motion. RP 41-42. In its written response though, the court made no mention of RCW 10.01.160(4). CP 279-80.

As a matter of constitutional and statutory law, Wallmuller was entitled to a hearing, at which the trial court considered whether the amount owed in LFOs caused a manifest hardship to Wallmuller. Yet, the trial court afforded Wallmuller no process. By refusing to meaningfully consider Wallmuller's motion for remission, the trial court violated the plain commands of RCW 10.01.160(4) and failed to provide the minimum process due under the constitution. This court should therefore reverse and give Wallmuller a fair hearing.

b. Wallmuller is aggrieved under RAP 3.1 by the complete denial of consideration of his LFO remission motion on its merits.

RAP 3.1 provides, "Only an aggrieved party may seek review by the appellate court." "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). To be aggrieved, a party must have a present and substantial interest, rather than a mere expectancy or contingent interest in the subject matter. *State v. Mahone*, 98 Wn. App. 342, 347, 989 P.2d 583 (1999). To determine whether a party has standing to appeal the superior court order as an aggrieved party, "aggrieved" has been defined to mean denial of some personal or proprietary right, legal or equitable, or the imposition upon a party of a burden or obligation. *Mestrovac v. Department of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P. 3d 536 (2008). The complete denial of any process to Wallmuller regarding his remission motion qualifies him as an aggrieved party.

In *Smits*, the defendant was given the precise remedy Wallmuller is asking for - a full evidentiary hearing on his remission motion. *Smits*, 152 Wn. App. at 518. Though the trial court ultimately disagreed with Smits that payment of the amount due for LFOs caused a manifest hardship, it

made its determination by holding a hearing and assessing the actual evidence before it. *Smits* supports Wallmuller's claim he is aggrieved by the trial court's failure to hold any semblance of a hearing on manifest hardship. Similarly, in *Mahone* "the [trial] court determined that Mahone did not show how payment would constitute a manifest hardship." 98 Wn. App. at 346. This demonstrates that the trial court in *Mahone* actually considered whether the imposed LFOs would cause manifest hardship and determined they would not. *Mahone* therefore also supports Wallmuller's claim that the trial court must consider motions for remission on their merits. Under both *Mahone* and *Smits*, Wallmuller has a present interest in obtaining a manifest hardship determination and is therefore aggrieved.

The time-of-enforcement rule, cited in *Smits* and *Mahone*, reasons that the courts need do nothing about the enormous sums imposed on indigent defendants until the State seeks to collect. The *Mahone* court, for instance, stated,

> Before Mahone is aggrieved . . . two things must happen. It must be determined that he has the ability to pay and the State must proceed to enforce the judgment for costs. Until such time as the State determines he has the ability to pay and enforces payment of the costs assessed against him, any attempt to determine whether payment will create a hardship is mere speculation.

98 Wn. App. at 348. The *Smits* court essentially recited *Mahone's* RAP 3.1 reasoning to conclude that Smits would not be aggrieved until the State sought to enforce collection. *Smits*, 152 Wn. App. at 525. Other cases also hold that challenges to LFOs are not ripe for review until the State attempts to collect the money. *See State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013) (collecting cases); *Crook*, 146 Wn. App. at 27 ("Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs.").

Any assertion that Wallmuller is not an aggrieved party under the time-of-enforcement rationale conflicts with *Blazina*. In *Blazina* the State argued that the LFO issue should not be reviewed because the proper time to challenge the imposition of an LFO arises when the State seeks to collect. *Blazina*, 182 Wn.2d at 832 n. 1. Although *Blazina* was concerned with ripeness, and not appellate standing under RAP 3.1, that *Blazina* reached the merits of the LFO issue despite no attempt by the State to collect the obligations suggests that Wallmuller has standing to proceed here. Although Wallmuller is in a different procedural position because he challenges uncollected costs through the remissions process, he owes

uncollected costs just like Blazina and is just as aggrieved as they were. *Blazina*, 182 Wn. 2d at 832 n. 1.

The *Blazina* court recognized the significant harms unpaid LFOs cause to indigent defendants, regardless of collection status. First, the court discussed the high interest rate attached to LFOs and the possibility of collection fees accumulating when LFOs are not paid on time. *Blazina*, 182 Wn.2d at 836. The court explained that

> [m]any defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month . . . . On average, a person who pays $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed . . . . Consequently, indigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount they owe.

Blazina, 182 Wn.2d at 836. The court further explained that the inability to pay LFOs means that the court system retains jurisdiction over impoverished offenders long after they are released from prison. *Blazina*, 182 Wn. 2d at 836-37. This long-term involvement inhibits reentry and can have serious negative consequences on employment, housing, and finances. *Blazina*, 182 Wn.2d at 837. LFO debt also affects credit ratings. *Blazina*, 182 Wn. 2d at 837.

Wallmuller owes or will owe substantial interest on his LFO's if he is released. CP 296-97; RP 32. This interest will continue to rise,

compounding at twelve percent per year. See, *Blazina*, 182 Wn.2d at 836-37 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid). The effect of the compounding interest on Wallmuller's LFOs substantially alter the status quo. Therefore, Wallmuller is an aggrieved party.

c. The evidentiary hearing must employ some standard to meaningfully assess whether LFOs impose a "manifest hardship," and consistent with Blazina, GR 34 provides a standard.

When faced with motions for remission, trial courts must determine whether "it appears to the[ir] satisfaction . . . that payment of the amount due will impose manifest hardship on the defendant" and, if so, decide whether to "remit all or part of the amount due in costs." RCW 10.01.160(4). This is a subjective and vague standard. "Manifest hardship" is not defined in Title 10 RCW. Nor does the case law interpreting RCW 10.01.160(4) say what "manifest hardship" means. To provide needed guidance, this court should instruct trial courts on how to assess manifest hardship when reviewing indigent parties' motions to remit LFOs.

Blazina provides helpful direction on how best to do so. The *Blazina* court stressed the need for an "individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court

must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. To assist the courts in making this determination, *Blazina* instructed that "[c]ourts should also look to the comment in court rule GR 34 for guidance." 182 Wn.2d at 838.

> This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a need-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Although the ways to establish indigent status remain nonexhaustive, *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs*.

Id. at 838-39 (emphasis added).

Under GR 34, a person is considered indigent when he or she receives assistance through a governmental needs-based, means-tested program such as TANF, Supplemental Security Income, poverty-related veteran's benefits, State-provided general assistance for unemployable individuals, or food stamps. GR 34(a)(3)(A). Indigency is presumed when a person's household income is below 125 percent of the federal poverty

guideline or when a person, despite being above the 125 percent threshold, has recurring living expenses that render him or her unable to pay fees and surcharges. GR 34(a)(3)(B)-(C). Courts may also determine a person is indigent based on "other compelling circumstances" "that demonstrate an applicant's inability to pay fees and/or surcharges." GR 34(a)(3)(D).

In addition, the Washington Supreme Court promulgated GR 34 based on "the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. The goal is to "ensure[] that meaningful access to judicial review is available to the poor as well as to those who can afford to pay." *Id.* GR 34 is particularly useful because it provides needed uniformity for determining ability to pay. *See Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013) ("GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard.").

Although the *Blazina* court proposed GR 34 as an appropriate standard to assess whether to impose LFOs at sentencing, there is no reason it is not also an appropriate standard to assess whether the payment of the outstanding balance of already assessed LFOs present a manifest hardship under RCW 10.01.160(4). If courts should "seriously question"

a person's ability to pay LFOs if he or she meets the GR 34 standard, why should they not also "seriously question" whether continuing to carry an outstanding criminal debt causes manifest hardship?

GR 34, in the remissions context, would best be employed as a rebuttable presumption, much like the *Blazina* court suggested. If a person meets the GR 34 indigency standard, courts should presume "that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.01.160(4). Then the State may attempt to rebut this presumption by presenting evidence that the payment of the outstanding balance of LFOs will not impose a manifest hardship because of the person's current or likely future ability to pay. Employing the GR 34 standard in this manner would allow trial courts to make meaningful manifest hardship assessments under the remission statute. This court should use this case as a vehicle to adopt GR 34 as a meaningful standard and procedure for assessing manifest hardship under RCW 10.01.160(4).

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Wallmuller does not prevail on appeal, he requests that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the

State is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an adult . . . to pay appellate costs."). Imposing costs against indigent defendants raises problems well documented in *Blazina*: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wn.2d at 835. *Sinclair* recognized the concerns expressed in *Blazina* were applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

This case is about the imposition of discretionary (and mandatory) costs Wallmulller can never pay given his earliest possible release at age 90. Wallmuller qualified for indigent defense services at trial. Supplemental Designation of Clerks Papers, Order Assigning Attorney (sub. nom. 4). He continues to qualify for indigent defense on appeal. Supp. DCP, Order of Indigency on Review (sub. nom. 414) and Amended Order of Indigency (sub. nom. 415). Importantly, there is a presumption of continued indigency through the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Wallmuller's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Given the serious concerns recognized in

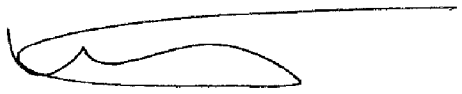
Blazina and *Sinclair*, this court should soundly exercise it discretion by denying the State's request for appellate costs in this appeal involving an indigent appellant.

CONCLUSION

Wallmuller's case should be remanded for his motion for remission of LFOs to receive fair and just consideration.

Alternatively, appellate costs should not be imposed in the event the State seeks them.

Respectfully submitted July 7, 2016.



LISA E. TABBUT/WSBA 21344
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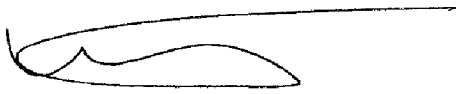
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Mason County Prosecutor's Office, at michaed@co.mason.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Frank Wallmuller/DOC#321793, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed July 7, 2106, in Winthrop, Washington.



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